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FREEDOM OF CONTRACT UNDER THE CONSTITUTION. — Four recent cases suggest under a variety of aspects the single problem, how far may the legislature regulate the terms of contracts without infringing the constitutional guarantees of liberty and property, which have been construed to include liberty of contract.¹ A well-defined line divides the cases in which such legislation is upheld into two classes, according to the grounds upon which the regulation is justified: first, statutes upheld because they subserve certain public interests; secondly, statutes upheld as an exercise of special and peculiar powers vested in the legislature. As will be seen, these two justifications, while logically distinct, are sometimes both present in the same case.

Complete freedom of contract is inconsistent with the necessity in a highly organized community for legislation to safeguard the public health, morals, safety, and general welfare. The limitations which are from time to time imposed as legislatures feel this necessity are usually upheld by the courts as an exercise of the police power.² Fortunately the bounds of this vague residuum of sovereignty have never been precisely defined. It has been the automatic governor in our constitutional machinery, and with some conspicuous exceptions³ it has kept pace with the

¹ See an article entitled "Liberty of Contract," by Prof. Roscoe Pound, 18 YALE L. J. 485.

² Noble State Bank v. Haskell, 219 U. S. 104; see Hudson Water Co. v. McCarter, 209 U. S. 349, 355.

³ Lochner v. New York, 198 U. S. 45; State v. Julow, 129 Mo. 163; Adair v. United States, 208 U. S. 161.

necessities of our increasingly complex civilization. The more enlightened tribunals have usually refused to take the extreme measure of condemning a law, unless it was palpably arbitrary and had no reasonable connection with the general welfare.⁴

A striking illustration of this commendable attitude, especially noteworthy as proceeding from the New York Court of Appeals, is to be found in one of the recent cases referred to. A statute was upheld which required every factory and mercantile establishment to give its employees twenty-four consecutive hours of rest in every seven days.⁵ *People v. Klinck Packing Co.*, 52 N. Y. L. J. 1925 (Ct. App.). The statute has a manifest resemblance to Sunday laws, which are almost universally upheld,⁶ but there is an important difference. Whereas Sunday laws subserve the public interest in two respects, by securing a peaceful and quiet day for public worship, and providing a day of rest and recuperation for the toiler, this enactment has only the latter ground to stand on. Its provisions impose additional restrictions only on those who are not already bound to obey the Sunday law. No previous case has been found, which even to this limited extent upholds a restriction of working hours for men equally with women and children, solely as a humanitarian measure and without the supporting consideration of Sunday as a day of general rest. But the court does not for that reason condemn the law. It recognizes that the Constitution does not require a dynamic society to conform to static legal concepts embalmed in the books, and that reasonable men may well think one day a week of enforced idleness a cheap and effective form of preventive medicine.

In contrast with this result stands a recent decision of the United States Supreme Court. Six of the justices held that a state could not forbid an employer to require of an employee an agreement to surrender membership in a union, as a condition of either securing or continuing in a job.⁷ *Coppage v. Kansas*, 236 U. S. 1. The ground of decision is that such a statute makes the "levelling of inequalities of fortune" an end in itself, and not an incident to the promotion of the general welfare.⁸ This presupposes a major premise, which is

⁴ See *Gundling v. Chicago*, 177 U. S. 183, 188; in *Erie R. Co. v. Williams*, 233 U. S. 685, 699, the court said: "The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

⁵ LABOR LAW, Art. 6, § 8 a; CONSOLIDATED LAWS, c. 31 (LAWS OF 1909, c. 36) as amended LAWS OF 1913, c. 740; PENAL LAW, § 1275.

⁶ *Hennington v. Georgia*, 163 U. S. 299, and cases cited.

⁷ KANSAS SESSION LAWS OF 1903, c. 222; GEN. STAT. KANSAS, 1909, §§ 4674, 4675. Similar statutes have been passed by Congress, and by the legislatures of California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Wisconsin, and Porto Rico. See BULLETIN OF THE BUREAU OF LABOR STATISTICS, No. 148, vols. 1 and 2.

⁸ The court considers itself bound by its unfortunate decision that Congress could not forbid an interstate railroad to discharge an employee solely because of his affiliation with a union. *Adair v. United States*, 208 U. S. 161, criticised by the Hon. Richard Olney, in 42 AM. L. REV. 164. See FREUND, POLICE POWER, § 326, for a statement of the ground on which the *Adair* case may be distinguished from the principal case. Day and Hughes, JJ., take this distinction, while Holmes, J., would overrule the *Adair* case. Another recent case extends the prohibition of the Fourteenth Amendment to a statute requiring a corporation to give an employee a true statement of the reason for dismissal. *St. Louis S. W. Ry. Co. v. Griffin*, 171 S. W. 703

deduced from the nature of things, that no statute which makes the "levelling of inequalities of fortune" an end in itself can reasonably tend to promote the public welfare. But the Supreme Court has upheld the following laws, which in the principal case are conceded to involve an incidental "levelling:" limiting hours of labor in dangerous employments;⁹ requiring semi-monthly payment of wages;¹⁰ requiring payment of wages in money instead of merchandise;¹¹ and securing a fair standard for estimating wages.¹² An observer would not have to be irrational to conclude that each of the specific evils which these statutes were directed against had a common source in the "inequality of fortune" between laborer and employer, which compels the laborer who contracts single-handed to accept a job on whatever terms it is offered to him. Unions are a reasonable way of overcoming this inequality, and hence depriving the employer of one weapon against unions is no more than striking a blow at the root of the above admitted evils. It is submitted that there is nothing palpably arbitrary in such a law. Statutes directed against "inequalities of fortune" may be always futile and generally ill-advised, but it is submitted that they are not invariably opposed to the general welfare and necessarily unconstitutional. The court declared a sounder doctrine when it said: "The Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference."¹³ What is the sacred nebula surrounding a "real difference" of fortune that it should be made an exception to the rule?

In the second group of cases, statutes regulating contracts are sustained on more technical grounds, either as a supervision of public works, or as an exercise of the state's power over corporations. It is now recognized in many courts that a state, like any other business enterprise, may make rules for its officials, servants, and administrative agencies in the transaction of public affairs.¹⁴ But recently a New York law requiring municipal corporations to employ on public works only United States citizens¹⁵ was condemned as depriving aliens of their rights under the Fourteenth Amendment.¹⁶ *People v. Crane*, 52 N. Y. L. J. 1408 (N. Y. App. Div.). With unimpeachable reasoning the opinion proves that the Fourteenth Amendment protects resident aliens as well as citizens, and that the statute is not within the legitimate scope of the police power. But as no one is entitled, of absolute right, to work for the state

(Tex.). There must always be some reason, if only sheer caprice. There seems no objection to compelling an employer to make a statement of it.

⁹ *Holden v. Hardy*, 169 U. S. 366; *Muller v. Oregon*, 208 U. S. 412.

¹⁰ *Erie R. Co. v. Williams*, 233 U. S. 685.

¹¹ *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

¹² *McLean v. Arkansas*, 211 U. S. 539.

¹³ See *Quong Wing v. Kirkendall*, 223 U. S. 59, 63.

¹⁴ Statutes restricting hours of labor: *Atkin v. Kansas*, 191 U. S. 207; *Ellis v. United States*, 206 U. S. 246; *People v. Metz*, 193 N. Y. 148, 85 N. E. 1070. *Contra*, *Cleveland v. Clements Bros. Con. Co.*, 67 Oh. St. 197, 65 N. E. 885; *Ex parte Kubach*, 85 Cal. 274, 24 Pac. 737. Statutes settling minimum wage: *Mallette v. Spokane*, 137 Pac. 496 (Ore.). *Contra*, *Street v. Varney Co.*, 160 Ind. 338, 66 N. E. 895. Statute requiring public printing to be done within state: *Ex parte Gemmil*, 20 Idaho, 732, 119 Pac. 298.

¹⁵ LABOR LAW, Art. 2, § 14; LAWS OF 1909, c. 36.

¹⁶ It is beyond the scope of this note to consider the possible objections to this statute as a violation of treaty obligations of the United States.

or its agencies,¹⁷ there can be no deprivation in respect of the alien. The state, like any other employer, is not restricted by the Constitution from a free choice of its employees.¹⁸ The municipality cannot object, for the great weight of authority holds that as an administrative agency of the state in carrying on public works it is subject to the directions of the state.¹⁹

Statutes which have nothing to do with the performance of public works, but which apply only to corporations, municipal and private, have been sustained as an exercise of the special legislative power to amend the charters of domestic corporations which is now reserved in nearly all states, and to regulate the admission of foreign corporations.²⁰ The limitations on this twofold power have not been worked out with any degree of exactness.²¹ In many cases this justification is relied upon by the courts as an additional ground to support statutes which come under the police power. The right to exclude foreign corporations before they acquire property in the state is extremely broad,²² and, generally speaking, any provision can be inserted by amendment into the charter of a domestic corporation which could have been introduced at the time of the original grant.²³

If a statute restricts liberty of contract and cannot be upheld on any of these grounds, it is invalid. An illustration is provided by the recent decision condemning the Arizona Alien Act, which applied indiscriminately to all employers of labor. *Raich v. Attorney-General*, U. S. Dist. Ct., Dist. of Arizona. (Not yet reported.) It promoted no legitimate public interest, and being of general application, advantage could not be taken of the narrower justification on which the New York statute should have been upheld.

THE RIGHT OF PUBLICITY. — A recent English case seems to recognize as appurtenant to premises abutting on a public way a right to have neighboring portions of the highway free from obstructions which unreasonably interfere with the view of the premises from the highway. *Cobb v. Saxby*, [1914] 3 K. B. 822.¹ In contradistinction to the right of privacy of the person, this might well be called the right of publicity. In this case one of two adjoining landowners was enjoined from

¹⁷ See *Atkin v. Kansas*, 191 U. S. 207, 223.

¹⁸ *People v. Ludington's Sons*, 131 N. Y. Supp. 550. *Contra*, *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786.

¹⁹ *Hunter v. Pittsburgh*, 207 U. S. 161, and cases cited *supra*, note 14. This right of regulation depends upon the public character of the work, and not upon the state's right to revoke the municipal charter at will. *Keefe v. People*, 37 Colo. 317, 87 Pac. 791. (The municipal corporation was created by the state constitution, for the express purpose of preventing legislative alterations in its charter.)

²⁰ *Erie R. Co. v. Williams*, 233 U. S. 685; *State v. Brown & Sharp Mfg. Co.*, 18 R. I. 16, 25 Atl. 246; *Shaffer v. Mining Co.*, 55 Md. 74.

²¹ For comment on this right, see 20 HARV. L. REV. 634.

²² *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246. See also 28 HARV. L. REV. 304.

²³ *Erie R. Co. v. Williams*, *supra*.

¹ For a more complete statement of this case, see RECENT CASES, p. 520, and 111 T. L. R. 814.